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Supreme Court of the United States.

OCTOBER TERM, 1951.

OLIN INDUSTRIES, INC.,
WINCHESTER REPEATING ARMS COMPANY
DIVISION,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Olin Industries, Inc., Winchester Repeating Arms Company Division, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit (hereafter called the Court below), entered in this cause August 7, 1951, enforcing an order of the National Labor Relations Board (hereafter called "the Board"); to review an order of the Court below, entered November 17, 1951, denying petitioner's petition for rehearing; and to review a further order of the Court below, entered January 14, 1952, denying petitioner's application for leave to file a second petition for rehearing and to adduce additional evidence.

Opinions Below.

The opinion of the Court below (T. 340),[1] filed August 7, 1951, is reported at 191 F. (2d) 613. The opinion of the Court below denying petitioner's petition for rehearing (T. 379), filed November 17, 1951, is reported at 192 F. (2d) 799. The order of the Court below denying the petitioner's application for leave to file a second petition for rehearing and to adduce additional evidence (T. 403), filed January 14, 1952, is not yet reported. The decision and order of the Board (T. 143) are reported in 86 N.L.R.B. 209.

Jurisdiction.

The judgment of the Court below was entered August 7, 1951 (T. 349). A petition for rehearing, filed September 17, 1951 (T. 351), was denied November 30, 1951 (T. 387). An application for leave to file a second petition for rehearing and to adduce additional evidence, filed on December 31, 1951 (T. 383), was denied January 14, 1952 (T. 403). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1), and under Section 10 (e) and (f) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Sec. 151 *et seq.*), hereinafter called "the amended Act."

Questions Presented.

I. Whether the provisions of Section 9 (f), (g) and (h) of the amended Act prohibit the Board from issuing an unfair labor practices complaint on the basis of a charge

[1] The letter "T" signifies the certified printed transcript of record.

filed by an individual, an attorney, where the charging party acts as a "front" or "agency" for a labor organization not in compliance with the filing requirements of the said section of the amended Act in filing a charge which alleges the commission of unfair labor practices against persons other than the charging party.

II. Whether the provisions of Section 10 (b) of the amended Act prohibit the Board from—

(1) issuing an unfair labor practices complaint *after* the effective date of the amended Act on the basis of a charge, filed with the Board *between* the enactment and effective dates of the amended Act, and alleging the commission of unfair labor practices *more* than six months prior to the filing of the charge; and

(2) amending the said complaint by adding allegations of discriminatory discharges, never before incorporated in any charge or complaint, where the amendment is made at a time more than six months after the date of the additional alleged discriminatory discharges *and* more than six months after the effective date of the amended Act.

III. Whether the provisions of Section 10 (b) of the amended Act prohibit the Board from issuing an unfair labor practices complaint on the basis of a charge that is not served upon the charged party by any of the four methods of service prescribed by Section 11 (4) of the amended Act and by Section 203.63 of the Board's Rules and Regulations, in the absence of any proof of actual receipt of the charge by the charged party.

IV. Whether the Board's finding, and back pay order based thereon, that petitioner was guilty of a discriminatory lockout on September 21, 1946, should be set aside in view of the fact that neither the charge nor the complaint alleged a lockout.

V. Whether, under the amended Act, an employer whose employees engage in a planned series of intermittent work stoppages to protest non-discriminatory changes in work schedules is barred from—

(*a*) discharging the ringleaders;

(*b*) shutting down the plant temporarily for the purpose of restoring orderly operations; and

(*c*) replacing striking employees who refuse to return without the ringleaders.

VI. Whether the Court below grossly misapplied the standard of substantial evidence on the record as a whole in upholding findings that—

(*a*) five individuals named in Appendix A, Group I, of the Board's Order (Beal, Giannelli, Johnson, Tardie and Wayert) were discriminatorily discharged;

(*b*) there was service by ordinary mail of the charge underlying the Board's complaint; and

(*c*) each of the strikers named in Appendix A, Group II, and five of those named in Appendix A, Group I, of the Board's Order (Brown, Raffone, Lonergan, Wilson and Considine) made an unconditional application for reinstatement.

Statutes Involved.

The statutes involved are the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Sec. 151 *et seq.*), and the Administrative Procedure Act (60 Stat. 237, 5 U.S.C. Sec. 1001 *et seq.*), the pertinent provisions of which are set forth in the Appendix, *infra*, at pages 30-34.

Statement of the Case.

This case involves the enforcement by the Court below of an order of the Board (T. 153) which in part directed petitioner to reinstate with back pay 106 employees, of whom 3 were discharged in 1942, 16 were discharged on September 20 and 21, 1946, and the balance of 87 of whom were strikers who were allegedly denied reinstatement on October 21, 1946.

On charges originally filed by a C.I.O. Union the Board had issued a complaint April 21, 1947, and the matter came to hearing on June 30, July 24 and 29, 1947 (T. 169, 170). Upon the Union's request in pursuance of their policy "to have nothing to do with the Taft-Hartley Law," which the Union proposed to by-pass, the hearing was terminated, the charges were withdrawn by the Union and the Board's motion to strike the complaint was allowed (T. 170).[2]

The following day, July 30, 1947, a charge was filed by Marvin C. Gold, an attorney at law. This charge was amended August 4, 6 and 18, 1947. The charges filed by Gold were substantially the same as those previously filed and withdrawn by the Union (T. 170). The complaint was issued April 8, 1948, and a lengthy hearing with almost six thousand pages of testimony was conducted from May 17 to July 15, 1948 (T. 163).

The Trial Examiner on November 24, 1948 issued his Intermediate Report (T. 160). The petitioner filed exceptions (T. 83) and requested leave to argue orally to the Board, which was denied (T. 317). On September 29, 1949, the Board issued its decision and order (T. 143).

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[2] On July 31, 1947, the Board granted the same Union's request to withdraw a petition for investigation and certification of representatives at petitioner's plant, thus terminating a hearing held on that petition. The Union's request was based on the same declared policy to by-pass the amended Act (T. 169).

On June 20, 1950, petitioner filed with the Court below a petition to review and set aside this order. The Board filed a motion to dismiss, which was denied, and then on October 31, 1950, the Board answered and requested enforcement of the order. On August 7, 1951, the Court filed its opinion that the petition to review and set aside should be denied and the Board's order enforced. On December 27, 1951, after denying petitioner's petition for rehearing, that Court issued its decree granting enforcement. The Court subsequently, on January 14, 1952, denied petitioner's application for leave (*a*) to file second petition for rehearing, and (*b*) to adduce additional evidence.

Further statements of fact bearing on petitioner's contentions are set forth below under the heading "Reasons for Granting Writ."

Reasons for Granting Writ.[3]

I.

The decision of the Court below on this issue is in conflict with the recent decision of the Court of Appeals for the Sixth Circuit in the case of *N.L.R.B.* v. *Alside Co.* (C.A. 6), 192 F. (2d) 678, decided November 26, 1951.

At the hearing before the Trial Examiner petitioner's counsel attempted to examine several Board witnesses as to whether Mr. Gold, the charging party, had been authorized by them to file the charges in their behalf. This examination was excluded by ruling of the Trial Examiner. One witness, James T. Evans, testified that he had first met Mr. Gold about a week or ten days before the hearing, although the charges had been filed almost a year before, and

[3] The numbering under this heading corresponds to the numbering of the issues under the heading "Questions Presented."

that that meeting had taken place at the union hall (App. to Petitioner's Brief, p. 24). At that point the General Counsel's representative objected that "it is wholly irrelevant where he met Mr. Gold and what went on there . . ." (App. to Petitioner's Brief, p. 25). The Trial Examiner sustained the objection (App. to Petitioner's Brief, p. 26) but at the request of petitioner's attorney he permitted an offer of proof to be made. The offer of proof is set forth in full at pages 27 and 28 of the Appendix to Petitioner's Brief.

In its exceptions to the Trial Examiner's Intermediate Report the petitioner stated:

> "It is a main contention of the respondent that the hearing upon which the Trial Examiner based his findings and wrote his intermediate report is one that could not be properly held under the law since the motivating force behind the hearing was and is a non-complying Union. That the use of Marvin Chaucer Gold was a front . . ." (T. 99.)

The Board, however, rejected petitioner's contention "that it was prejudiced by the Trial Examiner's refusal to admit evidence purporting to show (1) that the Union, which is not in compliance with the filing requirements of Section 9 (f), (g) and (h) of the amended Act,[4] requested Gold to file the instant charges and turned over to him its files and exhibits including the names and addresses of all the complainants and (2) that Gold was not authorized by the complainants to execute a charge on their behalf," and held that "it is immaterial that he might be acting on behalf of the Union . . ." (T. 143, footnote 2).

The petitioner applied to the Court below under Section 10 (e) of the amended Act (see Appendix, *infra*, p. 32)

[4] See Appendix, *infra*, pp. 30-31.

for leave to adduce additional evidence on this point and this application was denied by the Court *per curiam.*

Three circuits have passed upon this "fronting" question—the Fifth Circuit in the case of *N.L.R.B.* v. *Augusta Chemical Co.* (C.A. 5), 187 F. (2d) 63, the Third Circuit in the case of *N.L.R.B.* v. *Clausen* (C.A. 3), 188 F. (2d) 439, and the Sixth Circuit in the case of *N.L.R.B.* v. *Alside Co., supra.*

The *Augusta* case, *supra,* and the *Clausen* case, *supra,* in which the Courts held the restrictions of Section 9 (f), (g) and (h) did not apply, the individuals who were alleged to be "fronting" for a non-complying Union had filed charges naming only themselves as alleged discriminatees.

In the *Alside* case, *supra,* however, the charging individual named himself *and other persons.* Similarly, in the case at bar the charging party named only a mass of other persons as alleged discriminatees; he himself was not even an alleged discriminatee.

It was on the basis of this distinction that the Court in the *Alside* case, *supra,* held that the restrictions of Section 9 (h) did apply to an individual who, in fact, acts not only for himself but who asserts the grievances of others as well.

That holding would require an examination of the question of fact as to whether Marvin C. Gold was a "front" for the non-complying Union, and is accordingly in conflict with the rulings of the Trial Examiner, the Board and the Court in the present case.

In addition, the failure of the Court below to permit examination of the factual question as to whether Gold was fronting for the non-complying Union creates an avenue for a non-complying Union to emasculate, to a large extent, the effect of this Court's decision in *N.L.R.B.* v. *Highland Park Mfg. Co.,* 341 U.S. 322, and therefore con-

stitutes a decision of an important question of Federal law which has not been, but should be, settled by this Court. The resolution of that conflict in favor of the view taken by the Sixth Circuit is vital to prevent complete frustration of the decision of this Honorable Court in *N.L.R.B.* v. *Highland Park Mfg. Co.*, under which decision this issue as to compliance with Sections 9 (f), (g) and (h), being jurisdictional, could properly have been raised in this Court for the first time, even had it not been previously asserted. *Mahler* v. *Eby*, 264 U.S. 32, 45.

II.

The Court of Appeals, in construing the proviso of Section 10 (b) of the amended Act[5] (*a*) has decided an important question of Federal law, as to the jurisdiction of the Board to issue complaints, which has not been, but should be, settled by this Court; and (*b*) has decided it in a way which is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Superior Engraving Co.* v. *N.L.R.B.*, 183 F. (2d) 783 (C.A. 7, 1950); cert. den. 340 U.S. 930, in the same matter, to wit, the power of the Board to issue and amend complaints after the effective date of the amended Act.

As applied to the facts of this case[6] the Court below sanctioned (*a*) the issuance of a complaint more than six months after the effective date of the Act based on charges filed between the enactment and effective dates of the amended Act but more than six months after the occurrence of the alleged violation, and (*b*) the amendment of a complaint more than six months after the effective date

[5] See Appendix, *infra*, p. 31.

[6] Alleged violations occurred in 1942 and in October, 1946; charge was filed July 30, and amended August 4, 6, and 18 (T. 24-38); complaint issued April 8, 1948 (T. 43), and was amended at the hearing (T. 163).

to allege for the first time violations occurring prior to the passage of the amended Act and more than six months prior to the amendment of the complaint and not previously charged.

The amendments to the National Labor Relations Act were enacted June 23, 1947, effective sixty days thereafter, or August 22, 1947. During that sixty-day period the filing and service requirements of Section 10 (b) did not apply; during that sixty-day period the Board had power to issue a complaint based upon a charge filed more than six months after the alleged unfair labor practice and never served.

However, the Board holds and the Court below agrees, in *N.L.R.B.* v. *Itasca Cotton Mfg. Co.*, 179 F. (2d) 504 (C.A. 5, 1950) and in the present case, that under Section 10 (b) the Board could continue *even after August 22, 1947*, to issue complaints upon charges filed and served up to six months after August 22, 1947, even though more than six months elapsed between the occurrence of the violation and the filing and serving of the charge.

In view of the sixty-day lag between the enactment and effective dates of the amendment, petitioner contends that the failure to give full literal effect to Section 10 (b) as written raises a Federal question requiring consideration and decision of this Court.

In the case of *Superior Engraving Co.* v. *N.L.R.B., supra*, the Court of Appeals for the Seventh Circuit held, in conflict with the Court below, that, although it was permissible for the Board to issue a complaint between the enactment and effective dates of the Act based on charges filed before the effective date alleging unfair labor practices occurring more than six months prior thereto, the Board did not have the power after the effective date of the Act to *amend* a complaint upon the basis of charges filed after the effective date and more than six months after the occurrence of the unfair labor practices charged.

In the *Superior Engraving* case, *supra*, the Court of Appeals for the Seventh Circuit referred to the decisions of the Court of Appeals for the Fourth Circuit in *Joanna Cotton Mills* v. *N.L.R.B.* (C.A. 4, 1949), 176 F. (2d) 749, and the Court of Appeals for the Fifth Circuit in the *Itasca* case, *supra*, and clearly disagreed with those decisions on the question of the effect of the proviso in Section 10 (b) upon the power of the Board to issue complaints.

It pointed out that the Court below relied in its decision in the *Itasca* case, *supra*, on the cases of *United States* v. *Morena*, 245 U.S. 392, and *Sohn* v. *Waterson*, 17 Wall. 596, and it distinguished those cases. It pointed out that in both those cases the statute created a period of limitations where none had previously existed and that, in accordance with the well-settled rule in such case, the limitation period begins to run with respect to pre-existing claims on the effective date of the statute.

However, it pointed out further that the Labor Management Relations Act, Title I, Section 104, expressly provided that "The amendments made by this title shall take effect sixty days after the date of the enactment of this Act . . ." It stated that the inclusion of this provision in the Act not only avoids the result which the rule of *Sohn* v. *Waterson, supra*, was designed to avoid, but also indicates an intention on the part of the Congress "that preexisting unfair labor practices, some of which would have been absolutely barred as grounds for the issuance of a Board complaint, had the six month limitation period for the filing of unfair labor practice charges been given immediate retroactive effect, were to be kept alive during the sixty day period until the Act became operative . . ." (183 F. (2d) 783, at 789-790).

Furthermore, the Court below, in deciding this Federal question, decided it in a way probably in conflict with applicable decisions of this Court, in that it declined to

give to the words "no complaint shall issue" in Section 10 (b) the jurisdictional meaning that this Court, in *N.L.R.B.* v. *Highland Park Mfg. Co., supra,* gave to the same clause in Section 9 (g) of the same Act. In the *Itasca* case, *supra,* which governed the Court's decision in the present case, the Court below stated: "Had the Congress intended the proviso to be retroactively jurisdictional, it would have read 'provided the Board shall have no power to issue etc.' " (179 F. (2d) 504, at 507), in which case the Court stated that the respondent would have had a strong position. The identical language "no complaint shall issue" appears in Section 9 (g) of the amended Act, which has been held by this Court in *N.L.R.B.* v. *Highland Park Mfg. Co., supra,* to have jurisdictional meaning and effect.

III.

The decision of the Court below decided an important question of Federal law which has not been, but should be, settled by this Court, in that it permits service of a charge, as required by Section 10 (b) of the amended Act (limiting the jurisdiction of the Board over unfair labor practice proceedings), to be made by ordinary mail, a method other than the four methods authorized by Section 11 (4) of the amended Act and by Section 203.63 of the Board's Rules and Regulations (prescribing the manner of service of Board process and papers). Furthermore, it decides the question in a way that is probably in conflict with applicable decisions of this Court.

The petitioner has been protesting since the first day of the hearing that it had never, prior to the service of the complaint itself in April, 1948, been served with "any charges" (T. 84, 160). In this connection it has contended (*a*) that the Board's claim of service by ordinary

mail is not proved by substantial evidence on the record as a whole, and (*b*) that in any event service by ordinary mail would not satisfy the requirements of the amended Act and the Board's Regulations. The first contention is discussed below.[7] The second is the subject of this discussion.

Judicial construction of the original Section 10 (b) settled that filing a charge was a prerequisite to the Board's jurisdiction over an unfair labor practice proceeding, in the sense that, absent the filing of a charge, the Board was powerless to issue a complaint. *Consumers Power Co.* v. *N.L.R.B.* (C.A. 6), 113 F. (2d) 38. The amended Section 10 (b) imposed a six months' limitation on fulfillment of the filing requirement, and added the further requirement of service of a copy of the charge on the person charged within the same time. The basic jurisdictional nature of both requirements is expressed by the provision that "no complaint shall issue"[8] unless filing and service are accomplished as prescribed.

Section 11 (4) (61 Stat. 136, 29 U.S.C., Supp. III, Sec. 161 (4)) provides in part:

> "Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered

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[7] P. 25.

[8] The identical clause in another Section of the Act, Section 9 (g), was held by this Court in *N.L.R.B.* v. *Highland Park Mfg. Co., supra,* to have jurisdictional meaning and effect.

and mailed or telegraphed as aforesaid shall be proof of service of the same. . . ."

That the word "may" was intended by Congress in this case to be mandatory is evident from the House Conference Report's statement that Section 11 (4) ". . . provides for the manner in which complaints, orders, and other processes of the Board *shall* be served." (Emphasis added.) 1 Legislative History of the Labor Management Relations Act of 1947, p. 562. The necessary inference is that Congress intended no sanction for any method of service other than the four methods expressly set forth, *e.g.*, by ordinary mail.

The Court below, though conceding that service by ordinary mail was a departure from the Board's rules then applicable to service of process and papers,[9] nevertheless held that the departure was "a mere technical defect" and should be disregarded (T. 379). However, there is in issue here *not only* a construction of the Board's rules of procedure, *but also* a construction of an Act of Congress which specifically prescribes the procedure which the Board shall follow in serving its process and papers. It is an axiom, not only of statutory construction but also of constitutional law, that, when a statute creates an administrative agency and imposes upon it a certain course of procedure, then such an agency *must* pursue the procedure imposed and prove compliance therewith in order to give validity to its action. *Wichita Railroad & Light Co.* v. *Public Utilities Commission of the State of Kansas,* 260 U.S. 48, 59. *Mahler* v. *Eby,* 264 U.S. 32, 44. This principle

[9] The National Labor Relations Board Rules and Regulations, Series 4, Sec. 203.63 (29 C.F.R. Ch. II, Federal Register, September 11, 1946). Section 203.63 is identical with the above-quoted provisions of Section 11 (4) of the Act, except that it deletes the word "either" from the third line.

is embodied in Section 6 (b) of the Administrative Procedure Act, 5 U.S.C. Sec. 1005 (b), which provides in part that—

> "No process . . . shall be issued . . . except as authorized by law."

Nor can the so-called rule of prejudicial error (Administrative Procedure Act, Sec. 10 (e)) be invoked, for—

> "The requirement that account shall be taken 'of the rule of prejudicial error' means that a procedural omission which has been cured prior to the finality of the action involved by awarding the party the procedure to which he was originally entitled is not a reversible error." [10]

This is especially true in the case of required service of process, for—

> ". . . the Supreme Court has said that all forms of substituted service in actions purely in personam, constitute departures from the rule of the common law and the *statutory authority therefor should be strictly followed.*" (Emphasis supplied.)

Wise v. *Herzog* (C.A. D.C., 1940), 114 F. (2d) 486, a decision rendered by the Court of Appeals for the District of Columbia while Chief Justice Vinson was a member of that Court.

It is therefore submitted that the Court below, in permitting service by ordinary mail, has decided an important question of Federal law that must be settled by this Court and has decided it in a way not consistent with principles laid down by this Court in other cases involving statutory authorization of substituted service.

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[10] 79th Cong., 2d Sess., H. Rep. No. 1980 (1946).

IV.

In affirming a finding of a lockout, which had not been alleged in either the charge or the complaint and which was not claimed or litigated at the hearing, the Court below has decided a Federal question in a way probably in conflict with the applicable decision of this Court in *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197; in conflict with the decision of the Court of Appeals for the Third Circuit in *N.L.R.B.* v. *Reliable Newspaper Delivery, Inc.* (C.A. 3, 1951), 187 F. (2d) 547, and in conflict with another panel of the same circuit in *N.L.R.B.* v. *Fulton Bag & Cotton Mills* (C.A. 5, 1949), 175 F. (2d) 675, thereby so far departing from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The complaint alleged in paragraph 7 that on or about September 21, 1946, the Rolling Mill Department went on strike as a result of the discharge of the three ringleaders (T. 41). That allegation was never amended, nor has there ever been alleged in either the charge or the complaint any lockout at any time.

If that allegation in the complaint is true, the petitioner is under no back-pay liability to the employees for any part of the period from September 21 to October 21, the date of the alleged mass applications for reinstatement. The finding made by the Trial Examiner and Board, and affirmed by the Court below, is that there was a lockout from September 21 to September 29. This finding resulted in an order imposing upon the petitioner financial liability for a period of approximately eight days to approximately one hundred employees.

In *Consolidated Edison Co.* v. *N.L.R.B., supra,* this Court, in setting aside that portion of a Board order requiring the Company to cease giving effect to contracts with an independent labor Union, where the validity of the

contracts was not attacked in the complaint or its amendments, said:

> "If the Board intended to make that charge, it should have amended its complaint accordingly, given notice to the Brotherhood, and introduced proof to sustain the charge." (305 U.S. 197, 238.)

In *N.L.R.B.* v. *Reliable Newspaper Delivery, Inc., supra,* the Court of Appeals for the Third Circuit stated the applicable facts and law as follows:

> ". . . Only four of the eight non-union employees were named in the charge and complaint before the Labor Board . . . The Board, in its order included 'all other non-union employees who were similarly situated . . .' . . . in our view, this action by the Board was unwarranted . . ." (187 F. (2d) 547, 550.)

and added in a footnote:

> "If the Board intended to include all the other non-union employees allegedly similarly situated, the complaint should have been amended accordingly, notice given to respondent and sustaining proof introduced . . ." (187 F. (2d) 547, 550, footnote 4.)

In *N.L.R.B.* v. *Fulton Bag & Cotton Mills, supra,* another panel of the Fifth Circuit, in disapproving a finding of discrimination with respect to five people not alleged in the charge or complaint, although no remedial order was issued on the basis of the finding, said:

> "Finally, as to the gratuitous, the volunteered findings of examiner and board, without charge or complaint to support them, that respondent discriminated in respect of Smith, Rose, Longmire, Kelley, and

> Guthrie, and the consequent condemnation of respondent for having done so, we find no warrant in the statute, none in the elementary conceptions of procedural justice for them. It is true that no consequences were visited upon respondent as a result of these findings, no doubt because it was clearly seen that to punish, as well as to condemn, without a charge and a hearing on the charge would be shocking to fundamental conceptions of justice." (175 F. (2d) 675, 677.)

It is submitted that such an intra-circuit conflict on an identical issue requires resolution by this Court. Cf. *John Hancock Mutual Life Insurance Co.* v. *Bartels* (C.A. 5), 100 F. (2d) 813; cert. granted 307 U.S. 617; aff'd 308 U.S. 180, 181.

It is submitted, in addition, that the holding of the Court below violated Section 5 (a) of the Administrative Procedure Act, which provides that "Persons entitled to notice of an agency hearing shall be timely informed of . . . (3) the matters of fact and law asserted. . . ."

It is also in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Joanna Cotton Mills, supra.* In that case the Fourth Circuit held that a charge and complaint could not be *amended* to change the alleged basis of a discriminatory discharge from "union activities" to "concerted activities." *A fortiori,* then, where there is not even an amendment of the charge or complaint and where there is a finding of discrimination (involving back pay) where no discrimination at all had been alleged, the action would not be permissible under Section 10 (b) of the National Labor Relations Act as amended.

If the holding of the Court below is valid, then the decision in the *Joanna* case, *supra,* can be nullified by the simple expedient of embodying the new matter in findings and orders without bothering to amend the complaint.

V.

In sanctioning the utilization by employees of a planned series of intermittent work stoppages, including a four-hour sit-down strike, and in according to that weapon the status of a protected concerted activity under the amended National Labor Relations Act, the Court below rendered a decision probably in conflict with the decisions of this Court in *International Union, U.A.W.A., A.F. of L., Local 232,* v. *Wisconsin Employment Relations Board,* 336 U.S. 245, and *N.L.R.B.* v. *Fansteel Metallurgical Corp.,* 306 U.S. 240. Furthermore, the decision of the Court below in this case, in affirming the Board's finding that discharge of the ringleaders of the first of the planned series of intermittent work stoppages was in violation of the amended Act, and that the shutdown of the plant after the second stoppage for the purpose of preventing further stoppages was an illegal lockout, has decided an important question of Federal law which has not been, but should be, settled by this Court, and has decided it in a way which is not consistent in principle with the decision of the Court of Appeals for the Seventh Circuit in *Morand Bros. Beverage Co.* v. *N.L.R.B.* (C.A. 7), 190 F. (2d) 576. In denying to the petitioner the right to replace employees who strike as a result of such discharges and shutdowns, the Court below has decided an important question of Federal law which has not been, but should be, decided by this Court.

There is little dispute as to the facts of the occurrences of September 15, 1946. The petitioner had announced some non-discriminatory changes in work schedules of the Rolling Mill Department. The employees of that department then agreed upon a plan of a series of intermittent temporary work stoppages in protest, during which interval a committee would undertake to present demands to management (T. 212). The men on the first shift, as part of this plan, and without advance warning to the petitioner,

refused to resume their jobs at the conclusion of their lunch period and resisted all orders of management to return to work or leave the premises (T. 213). The ringleaders were Bonito, Baldino and Destadio (T. 215). At the conclusion of fifteen minutes and after the Chief of Police had been called, the employees went back to their tasks at the direction of Destadio (T. 214, 217). Bonito, Baldino and Destadio were discharged because of their part in this first stoppage (T. 147).

The events on the second shift were more aggravated. The men refused to return to work at the conclusion of their lunch period and persisted in their refusal to either work or leave the premises until 11 p.m., some four hours later, the time when their shift would have ended in any event, despite having several times been ordered either to work or to leave the premises (T. 224). Foreseeing a continuation of the same difficulty, the petitioner did not open its plant for the third shift (T. 224-225).

The effect of the Court's decision to enforce the Board's order based on findings that the work stoppages were protected concerted activities, that the discharges were in violation of the Act and that the shutdown was a discriminatory lockout (T. 147, 148) is inconsistent with the holdings and principles enunciated by this Court in *International Union, U.A.W.A., A.F. of F., Local 232,* v. *Wisconsin Employment Relations Board, supra.*

In that case, the State Board had held it to be an unfair labor practice under Wisconsin law for the Union to conduct a planned series of "recurrent and unannounced stoppage of work." This Court, in reviewing the decision of the Wisconsin Supreme Court's enforcement of the cease and desist order of the State Board, held that the

> ". . . recurrent or intermittent unannounced stoppage of work to win unstated ends was neither forbid-

> den by federal statute *nor was it legalized and approved thereby. . . .*" (336 U.S. 245, 264-265.) (Emphasis supplied.)

Although this Court then mentioned the absence of specific demands, it is apparent that the more important test is whether the stoppages were part of a planned series or were isolated, as in *American Mfg. Co.*, 5 N.L.R.B. 443, 106 F. (2d) 61 (C.A. 2); aff'd as modified 309 U.S. 629, a case which was distinguished by this Court in the *International Union* decision, *supra*, but which was followed by the Trial Examiner and the Board in the present case without regard to the distinction between planned and isolated stoppages (T. 252).

The Board condoned the sit-down by the second shift on the ground that the reason given by the sit-down strikers for their refusal to leave was that they had been previously told that failure to work that Saturday would result in discharge and they therefore refused to obey management's orders to yield the premises unless given "a written agreement that everything was O.K." (T. 224). This condonation is not supported or warranted by, in fact is in contravention of, this Court's decision in the *Fansteel* case, *supra*.

If the holding, made by the Board and sustained by the Court below, that the planned series of intermittent work stoppages (including the four-hour sit-down strike) is a protected concerted activity under the Act is set aside, it will follow that the discharge of the ringleaders is not in violation of the Act.

This Court's reasoning in *International Union, U.A.W.A., A.F. of L., Local 232*, v. *Wisconsin Employment Relations Board, supra*, included a conclusion that it would be "inconsistent with the whole purpose" of the amended

Act to leave the employer without any kind of self help ("to dismiss or discipline employees") to combat these tactics (336 U.S. 245, 264). For the sit-down phase, the *Fansteel* case is express authority for the right to dismiss.

The shutdown stands on a different footing. The finding of a discriminatory lockout presents the question whether an employer whose employees are conducting a planned series of intermittent work stoppages, albeit the employees are acting for a proper purpose under the Act, may shut down his plant for the purpose of restoring orderly operations. This question was not involved in *International Union, U.A.W.A., A.F. of L., Local 232,* v. *Wisconsin Employment Relations Board, supra,* and was therefore not decided there. It should be decided by this Court, and the decision in this case by the Court below, which has the effect of a holding that the employer must keep his plant open for further stoppages, should be set aside. The better rule has since been promulgated by the Board:

> "Nothing in the Act, in our opinion, requires that an employer continue to operate his plant despite the prospect of recurrent work stoppage which would make further operations uneconomical." (*International Shoe Co.,* 93 N.L.R.B. No. 159, March 26, 1951.)

Likewise, in the recent decision in *Morand Brothers Beverage Co.* v. *N.L.R.B., supra,* the Seventh Circuit Court of Appeals held that a union strike against one member of an employer association after contract negotiations with the association had deadlocked was a protected concerted activity under the amended Act. Nevertheless, the Court held that the other members of the association were not stripped of retaliatory measures by the amended Act:

". . . they had a right to counter the strike's effectiveness by laying off, suspending or locking out their salesmen, who were members of the striking Union, and as to whom there was not then in effect any collective bargaining agreement. We so hold, not merely on the basis of the implied recognition in the 1947 Amendment to the Act, Section 8 (d) (4), of the existence of such a right, but because the lockout should be recognized for what it actually is, i.e., the employer's means of exerting economic pressure on the union, a corollary of the union's right to strike." (190 F. (2d) 576, 582.)

Our case is analogous to *C. G. Conn Ltd.* v. *N.L.R.B.* (C.A. 7, 1939), 108 F. (2d) 390, 397, which held that an employer had the right to discharge employees who concertedly and without warning refused to work overtime but did work during regular hours, in the sense that, if employees acting in concert work at times and abstain from work at other times, the employer may refuse to have them work at all.

Even assuming that the discharge of the three ringleaders was an unfair labor practice and that it became an issue in the labor dispute, we would have a case of a strike for mixed purposes—to remedy an unfair labor practice and to accomplish economic demands. Whether in such a case the employer has the right to replace the strikers is a question not answered by *N.L.R.B.* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, or by any other decisions of this Court, but it is submitted that it should be decided by this Court.

VI.

The decision of the Court below, in holding that findings of the Board (*a*) that Beal, Giannelli, Johnson, Tardie and Wayert were discriminatorily discharged; (*b*) that the third amended charge was mailed by ordinary mail on August 18, 1947; and (*c*) that all 106 of the named individuals made application for reinstatement, are supported by substantial evidence on the record considered as a whole, represents a gross misapplication of the standard prescribed by this Court in *Universal Camera* v. *N.L.R.B.*, 340 U.S. 474. In that case this Court said that it would intervene in cases in which that standard was misconstrued or grossly misapplied and it is submitted that this is such a case.

(*a*) The finding that Beal, Giannelli, Johnson, Tardie and Wayert were discriminatorily discharged. As to these five the Trial Examiner found that they

> "did not give testimony. For them neither employee record cards nor employment termination slips are in evidence. Beal was discharged as of September 20; the other four as of September 21. The undersigned finds it a justified inference that these five employees were discharged because of participation in concerted activities September 21, 1946." (T. 239.)

In the case of other employees discharged for such participation record cards were put in evidence frankly showing that as the reason—petitioner considered such participation to be good cause for discharge and made no effort at concealment or suppression. Furthermore, in a plant employing 6000 to 14,000 employees the discharge of these five people on two days (the day of and the day preceding the concerted activity) would not warrant an

inference that the events are related. The case is submitted to be one of complete lack of evidence of discrimination, of a finding based solely on unwarranted inference, and a proper case for intervention by this Court. At no time has either the Board in its briefs, or the Court in its opinions, contradicted, dealt with, discussed or even mentioned the petitioner's specific contention that the finding as to these five discharges is not supported by substantial evidence on the whole record.

(*b*) The Court below affirmed the Board's finding that the third amended charge, on which the Board's complaint was based, was served on petitioner by ordinary mail on August 18, 1947, a date prior to the effective date of the amended Act (T. 377). The finding rests solely on the affidavit of Dorothy M. Fryder (T. 135), which was incorporated into the record as proof of the service of the third amended charge on petitioner on August 18, 1947, by an order of the Board (T. 142). Close scrutiny of this affidavit, it is submitted, reveals that nothing therein contained warranted a finding either that the third amended charge was mailed to petitioner by ordinary mail on August 18, 1947, or that petitioner received a copy of the third amended charge at any time prior to April 6, 1948, when the Board issued and served its complaint on petitioner by registered mail, together with a copy of the third amended charge.

"Service" within the meaning of Section 11 (4) of the Act and the Board's Rules and Regulations, *supra*, is not complete until the process or paper served is actually received by the party entitled to service. "It is the receipt . . . which constitutes service." *N.L.R.B.* v. *Friedman-Harry Marks Clothing Co.* (C.A. 2), 83 F. (2d) 731, 733.

The rule as to the character and sufficiency of proof of mailing is stated as follows in *United States, ex rel. Hel-*

mecke, v. *Rice* (D.C. S.D. Texas), 281 Fed. 326, 331, and approved by the Court below in *United States* v. *Barnette* (C.A. 5), 91 F. (2d) 10, 11:

> ". . . the fact of mailing, where that fact is an important one, must be proven, like any other fact, by direct or circumstantial evidence, and that, where there is no direct evidence of mailing, it is not sufficient proof of mailing to offer testimony merely that the general custom of an office was to mail all letters and notices. The better rule, and that which seems to be established by the weight of authority, is that in the absence of direct evidence there must be proof of an invariable custom or usage in an office of depositing mail in a certain receptacle, that the letter in question was deposited in such receptacle, and in addition there must be testimony of the employee, whose duty it was to deposit the mail in the post office, that he either actually deposited that mail in the post office, or that it was his invariable custom to deposit every letter left in the usual receptacle, and that he never failed in carrying out that custom."

Measured by this rule, the Tryder affidavit is on its face insufficient proof of the mailing of the third amended charge to petitioner on August 18, 1947.

Nothing in the affidavit lists among Tryder's duties the actual deposit for mailing of letters prepared by Tryder. Nothing in the affidavit sets forth any custom of placing letters in a certain receptacle for mailing. The fifth paragraph of the affidavit, dealing with the question of actual mailing, states in substance and *in the third person* that the letter of August 18, 1947, was "placed with the outgoing mail for that day and duly deposited in the United

States mail." Other recitals in the affidavit were, by significant contrast, *in the first person.* There is no statement that Tryder herself placed the letter in the outgoing mail or deposited it in the United States mail, or that it was Tryder's duty to do so, or that Tryder saw anybody do so. Accordingly, the recitals in the fifth paragraph are not, under the rule stated above, competent evidence of the fact of mailing of a copy of the third amended charge to petitioner on August 18, 1947.

(*c*) The finding (T. 149) that one hundred and six named individuals had applied for reinstatement is made without direct evidence as to eighty-five of them. There was testimony that a group of strikers, variously estimated to consist of two hundred to over four hundred (App. to Respondent's Brief, pp. 98, 78) people, assembled on the sidewalk outside the personnel office for the purpose of making application for reinstatement at about 8 a.m. on October 21, 1946 (T. 232).

Of this group, only twenty-one testified at the hearing and only two of them testified that they were interviewed by the petitioner on October 21, 1946, and were notified that there was no work available for them. There is no evidence that any of the other nineteen testified that he had notified the petitioner of his unconditional willingness to return to work.

More important, however, is the fact that *none* of the other eighty-five named in the decree was specifically identified in any way as having been among the group that had assembled at the plant. The nature of the evidence relied upon by the Trial Examiner, the Board and the Court below is submitted to be too sweeping and general to be adequate for this purpose. The evidence consisted mainly of an estimate by an official of petitioner that about two hundred fifty strikers were there and general employee

statements of the following character: Employee Morton testified: "We all went back to Winchester's personnel Monday morning." Employee Conte stated: "We all went up to the front of personnel." Another employee, Los, testified: "Well, all the guys were down there, a long line of them." Raffone, another employee, stated: "We all had made plans to go meet and go there as a body. We did." Employee Wilson testified: "Well we all assembled out in front of the office that day." Employee Muir stated: "Well, all the fellows were up at personnel" (footnote 4, p. 11 of the Court's opinion, T. 3~~4~~8).

This testimony was plainly not intended, even by the Board counsel, to be taken literally as evidence that each and every one of the strikers was in the group. This is apparent from his intention to have each of the individuals involved take the stand, and this offer and its rejection by the Trial Examiner are plainly not a substitute for evidence against the petitioner as the Court seemed to feel (see footnote 5, p. 12 of the Court's opinion, T. 3~~4~~8).

Even as to the small group that testified, it was not literally true that each had been in that group outside the personnel office. One of them, Alex Milner, admitted he had never made an effort to return to work for the petitioner, having found suitable employment elsewhere about a week after the strike started, *i.e.*, about September 30, 1946 (Board Transcript of Testimony, 2683, 2713; T. 380).

Certainly such evidence could not suffice to establish the presence of any specified one or more of these eighty-five individuals in the assembled group for the purpose, *e.g.*, of proving participation by the individual in a wrongful act of any kind committed by the assembled group.

See, *e.g.*, *Matter of Local No. 1150, U.E.—C.I.O. (Cory Corp.)*, 84 N.L.R.B. 972, 973, footnote 5.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

Statutes Involved.

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. III, Sec. 151 *et seq.*):

"Sec. 9. . . .

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, . . .

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

"SEC. 10. . . .

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in

which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

. . . . . .

"(e) . . . If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript . . ."

"SEC. 11. . . .

"(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified

return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. . . ."

Administrative Procedure Act (60 Stat. 237, 5 U.S.C. Sec. 1001 *et seq.*):

"SEC. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . .

"(a) NOTICE.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted . . ."

. . . . . .

"SEC. 6. Except as otherwise provided in this Act— . . .

"(b) INVESTIGATIONS.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. . . ."

. . . . . .

"SEC. 10. . . .

"(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

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